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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 Case No. C17-339RSM

11 NATIONAL FROZEN FOODS
12 CORPORATION, A WASHINGTON
13 CORPORATION,,

14 Plaintiff,

15 v.

16 BERKLEY ASSURANCE COMPANY, an
17 Iowa Corporation,

18 Defendant.

ORDER DENYING PLAINTIFF'S
MOTION TO COMPEL DISCOVERY
WITHHELD BY AMWINS

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20 This matter comes before the Court on Plaintiff National Frozen Foods Corporation
21 ("NFF")'s Motion to Compel Discovery Withheld by AmWINS. Dkt. #108. NFF moves to
22 compel Defendants AmWINS Brokerage of Arizona, AmWINS Brokerage of Illinois, and
23 AmWINS Group, LLC (collectively referred to as "AmWINS") to produce emails identified in
24 twenty-four entries of a privilege log as being protected by work product and attorney client
25 privilege. AmWINS opposes this Motion. Dkt. #112.
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27 "Parties may obtain discovery regarding any nonprivileged matter that is relevant to
28 any party's claim or defense and proportional to the needs of the case, considering the

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1 importance of the issues at stake in the action, the amount in controversy, the parties' relative
2 access to relevant information, the parties' resources, the importance of the discovery in
3 resolving the issues, and whether the burden or expense of the proposed discovery outweighs
4 its likely benefit." Fed. R. Civ. P. 26(b)(1). If requested discovery is not answered, the
5 requesting party may move for an order compelling such discovery. Fed. R. Civ. P. 37(a)(1).
6 The party that resists discovery has the burden to show why the discovery request should be
7 denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

9 "Practicing attorneys recognize the importance of the [attorney-client] privilege and the
10 safe harbor that it provides to encourage 'full and frank communication between attorneys and
11 their clients and thereby promote broader public interest in the observance of law and
12 administration of justice.'" *Gomez v. Vernon*, 255 F.3d 1118, 1131 (9th Cir. 2001) (quoting
13 *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). The
14 parallel work-product doctrine shelters the mental processes of attorneys, recognizing that
15 without "a certain degree of privacy . . . [i]nefficiency, unfairness and sharp practices would
16 inevitably develop in the giving of legal advice and in the preparation of cases for trial," thus
17 demoralizing the legal profession and poorly serving the interests of clients and the cause of
18 justice. *MKB Constructors v. Am. Zurich Ins., Co.*, Case No. C13-0611JLR, 2014 U.S. Dist.
19 LEXIS 78883, *7-8, 2014 WL 2526901 (W.D. Wash. May 27, 2014) (citing *Hickman v.*
20 *Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947)). The work product doctrine
21 is a qualified protection limiting discovery of "documents and tangible things" prepared by a
22 party or his or her representative in anticipation of litigation or trial. *Admiral Ins. Co. v. U.S.*
23 *Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989); *see Upjohn*, 449 U.S. at
24 397-402; *see* Fed. R. Civ. P. 26(b)(3). A party can obtain discovery of work product only on a
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1 showing of “substantial need” and an inability to obtain equivalent information from other
2 sources. Fed. R. Civ. P. 26(b)(3)(A)(ii).

3 The background facts of this case have previously been set forth by this Court in its
4 Order on September 12, 2018, and are incorporated by reference here. *See* Dkt. #105.

5 The emails at issue were drafted by AmWINS employees after its legal department
6 began a process of collecting internal information in anticipation of litigation. This process
7 began in October 2016. Based on the record before it, the Court finds that it was reasonable for
8 AmWINS to anticipate that litigation would follow, even at that early date. *See* Dkt. #113
9 (Mims Declaration) at ¶¶ 2-4.

10 The emails fall into two categories: emails where one party is an attorney, and emails
11 between non-attorneys. AmWINS’s Privilege Log consists of seventy-one “Entry Numbers.”
12 Dkt. #109 at 17–30. Entry Numbers 1-25 claim “Work Product; Attorney-Client Privilege.”
13 However, entry Numbers 1-12, 15-16, 18-19, and 25 were neither authored nor received by an
14 attorney.¹ *Id.* The remaining Entry Numbers at issue (13-14, 17, and 20-23) include
15 AmWINS’s in-house counsel.² *Id.*

16 The Court finds that AmWINS has met its burden of demonstrating that the work
17 product privilege applies for all of these emails. The parties seem to agree about the nature of
18 these emails, if not their content. They were created by attorneys and other representatives of
19 AmWINS at the behest of AmWINS in-house counsel. As corporate defendants, AmWINS can
20 only act by and through its employees or representatives. Here, the first category of emails

21 ¹ AmWINS’s description for documents in which no attorney is involved is, generally, (1) “email ... regarding
22 investigation into and search for documents related to NFF’s 2016 placement. Performed per instructions provided
23 by AmWINS’ legal department,” or (2) “email ... regarding NFF’s claim. Performed per instructions provided by
24 AmWINS legal department.” Dkt. #109 at 17–25 (Entry Nos. 1-12, 15-16, 18).

25 ² The description provided for documents in which AmWINS’s in-house counsel is involved is, generally, (1)
26 “emails and attachments regarding investigation into and search for documents related to NFF’s 2016 placement,”
27 and (2) “regarding discussion of NFF account and claim.” Dkt. #109 at 17–25 (Entry Nos. 13-14, 17, 20-23).

1 were between AMWINS brokers and IT personnel, dealt with the searching for and reviewing
2 of documents related to the policy and claim anticipated to be at issue in future litigation, and
3 were not created in the ordinary course of business. *See* Mims Decl. at ¶¶ 4–6. This type of
4 communication, where the party’s employees are discussing gathering materials at the behest of
5 an attorney, is privileged under the work product doctrine even if an attorney is not included in
6 the communication. *See Kandel v. Brother Int’l Corp.*, 683 F. Supp. 2d 1076, 1084, 2009 U.S.
7 Dist. LEXIS 124189, *17 (C.D. Cal. 2009) (citing, *inter alia*, *Massachusetts Eye and Ear*
8 *Infirmity v. QLT Phototherapeutics, Inc.*, 2001 U.S. Dist. LEXIS 23785, 2001 WL 1180694, *2
9 (D. Mass. 2001). NFF argues that gathering of this information was within the ordinary course
10 of business, citing the deposition of Robert Balogh. *See* Dkt. #121 (citing Dkt. #109). NFF
11 interprets his statements too broadly; gathering policy files may be ordinary in some
12 circumstances and related to litigation in others, depending on the knowledge and intentions of
13 the individuals who ordered that the documents be gathered. Whether or not the materials in
14 question contain opinion or factual work product, NFF has not met its burden under Rule
15 26(b)(3) to show “substantial need” for these materials. NFF has not demonstrated that the
16 requested information is an essential element of this case, instead these emails appear to include
17 employees’ commentary on the search for underlying materials that are essential to this case.
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21 The second category of emails is similar but involves in-house counsel providing legal
22 counsel related to the gathering of these materials. All of the same analysis applies, and it is
23 likely that the attorney-client privilege would apply as well. Given the conclusion that these
24 materials are privileged, the Court will deny this Motion.
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1 Having reviewed the relevant briefing and the remainder of the record, the Court hereby
2 finds and ORDERS that Plaintiff NFF'S Motion to Compel Discovery Withheld by AmWINS,
3 Dkt. #108, is DENIED.

4 DATED this 27 day of November, 2018.

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7 RICARDO S. MARTINEZ
8 CHIEF UNITED STATES DISTRICT JUDGE
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